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Supreme Court of the United States

October Term, 1959

No. 458

ORVAL E. FAUBUS, Governor of the State of Arkansas,

Appellant,

—v.—

JOHN AARON, *et al.*,

Appellees.

No. 471

ARKANSAS STATE BOARD OF EDUCATION, and ARCH W. FORD, Commissioner of Education,

Appellants,

—v.—

JOHN AARON, *et al.*,

Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS, WESTERN DIVISION

D.

MOTION TO AFFIRM

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MOTION TO AFFIRM

Appellees in the above-entitled cases move to affirm on the ground that the questions presented are so unsubstantial as not to need further argument.

Questions Presented

Appellees, for the purposes of this motion, adopt the "Questions" as presented by appellant in No. 458 at pages 4-5 of his Jurisdictional Statement and by appellants in No. 471 at page 3 of their Statement as to Jurisdiction.

Statement of the Case

The appeals in this case involve the constitutionality of the two Arkansas school closing laws which were adopted at a special session of the legislature following the decision of the Court of Appeals in *Aaron* v. *Cooper*, 243 F. 2d 361, signed into law by the Governor of Arkansas on the day this Court decided *Cooper* v. *Aaron*, 358 U. S. 1, and, thereafter, on that same day, set in operation by the Governor's promulgation of a Proclamation closing all of the senior high schools in Little Rock.

The complete history of this litigation from its inception plus a statement of the proceedings giving rise to these appeals, as well as the undisputed facts there adduced, are set out in the *per curiam* opinion below. 173 F. Supp. 944.

Reasons for Granting the Motion

1. The questions presented on the instant appeals in the Little Rock litigation put in issue another attempt of state officials to "war against the Constitution." Earlier efforts to do so by means of gubernatorial, judicial and administrative action could not be squared with the mandate of the Federal Constitution. *Faubus* v. *United States*, 254 F. 2d 797, cert. denied 358 U. S. 829; *Thomason* v. *Cooper*, 254 F. 2d 808; *Cooper* v. *Aaron*, 358 U. S. 1. The case at bar merely concerns an attempt to achieve the forbidden end by legislative action. Thus, the case has nothing else to distinguish it and the decision by the court below is correct. See *Cooper* v. *Aaron*, 358 U. S. 1, 16-19; *Aaron* v. *Cooper*, 261 F. 2d 97, 99-102, 108; *James* v. *Almond*, 170 F. Supp. 331 (E. D. Va. 1959); *Harrison* v. *Day*, 200 Va. 439, 106 S. E. 2d 636 (1959). Cf. *James* v. *Duckworth*, 173 F. Supp. 342, 346-347 (E. D. Va. 1959), affirmed *Duckworth*

v. *James*, 267 F. 2d 224 (4th Cir. 1959), cert. denied 28 U. S. L. Week 3110 (October 13, 1959) (No. 286).

2. Moreover, the issue raised by appellants is "too moribund" for full hearing. Over a century before this Court in *Cooper* v. *Aaron* admonished state officials not to essay nullification by legislation—either "openly and directly" or "indirectly . . . through evasive schemes"—Justice Clifford, speaking for the Court in *Riggs* v. *Johnson County*, 6 Wall. 166, said at page 195:

> Repeated decisions of this court have also determined that state laws, whether general or enacted for the particular case, cannot in any manner limit or affect the operation of process or proceedings in the Federal Courts. *U. S.* v. *Peters*, 5 Cranch, 136.
>
> The Constitution itself becomes a mockery, say the court in that case, if the state legislature may at will annul the judgments of the Federal courts, and the nation is deprived of the means of enforcing its own laws by the instrumentality of its own tribunals. *Slocum* v. *Mayberry*, 2 Wheat. 9; *Beers* v. *Haughton*, 9 Pet. 359.

3. Finally, there is no substantial merit to appellants' positions with respect to judgment below with respect to Act 5, as amended by Act 151. In No. 458 appellant asserts that the decision of the Supreme Court of Arkansas in *Fitzhugh* v. *Ford*, 323 S. W. 2d 559, is involved (Appellant's Brief, p. 4) and, subsequently, argues that it should control the disposition of this appeal (*ibid.*, pp. 18-20). However, the state Supreme Court "did not consider whether [Act No. 5] violated any part of the Constitution of the United States." 173 F. Supp. 944, 951. See Appellants' Brief, page 4. Furthermore, although appellant made no suggestion of this, the construction given Act 5

in *Fitzhugh* v. *Ford* was one which neither precluded nor avoided decision on the constitutionality of Act 5 by the court below.

In No. 471 appellants ask this Court to consider the effect of Act 466, an amendment to Act 5 "in effect shortly before the decision of the lower court," which was "apparently not considered" (Appellants' Brief, p. 2). In addition, they indicate that "in [their] brief, a reference to Act 5, as amended, refers to the Act, as amended by Acts 151 and 466, Ark. Acts of 1959" (*id.*). Thereafter, the case they make for full hearing rests—principally, if not exclusively—on the application of Act 466 (see Appellants' Brief, pp. 4-7). But elsewhere appellants explain that "Act 5, as amended, merely authorizes the State Board of Education to withhold funds from schools which have been closed by the Governor under Act 4," and admit that "After Act 466 became effective, the funds could be withheld as before but could not be paid to another district except where a school had been closed by the order of the Governor . . . " (*ibid.*, p. 4).

Thus, here as in *Texas Co.* v. *Brown*, 258 U. S. 466, a case cited by appellants to support this Court's consideration of Act 466, no case is shown for the application of this Act. Rather, as the Court concluded in that case at page 483: "It is conceded that this does not repeal or affect the [instant] laws, and no argument is rested upon it except in support of contentions already disposed of."

CONCLUSION

For the foregoing reasons the questions presented by appellants are clearly unsubstantial and this motion to affirm should be granted.

Respectfully submitted,

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